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Pretrial Discovery of Existence and Limits of Automobile Liability Insurance

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PRETRIAL DISCOVERY OF EXISTENCE AND LIMITS OF AUTOMOBILE LIABILITY INSURANCE

The purpose and scope of this note is to analyze the apparent irreconcilable conflict which exists in both state and federal cases with respect to the discoverability of a defendant's liability insurance policy and its limits in an action based on an automobile accident. The cases analyzed are limited to those involving automobile accidents in which the plaintiff has attempted to learn of the existence of liability insurance through one of three techniques of discovery as provided by the Federal Rules of Civil Procedure or similar state procedures: (1) oral deposition,[1] (2) written interrogatories,[2] and (3) orders for production and inspection of documents.[3] The basic rule in this area is Rule 26 (b) which provides for the scope of examination permissible under these rules. The state cases discussed involve those states which have adopted, either by statute or court promulgated rules, civil procedure.[4] The analysis here is limited to the reasoning employed by both state and federal courts in denying or allowing pretrail discovery of the existence and limits of liability insurance in automobile negligence actions. Therefore, the particular discovery technique employed by the plaintiff in these cases is not significant for this purpose.

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[1] FED. R. CIV. P. 30.

[2] FED. R. CIV. P. 33.

[3] FED. R. CIV. P. 34.

[4] For example, the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. West Virginia's version of Rule 26 (b) is substantially the same as the corresponding federal rule and provides as follows:

> Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense or any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts, except that the deponent may not be examined as to any writing described in Rule 34 (b) unless the court in which the action is pending has ordered the production or inspection thereof upon motion of the examining party. It is not grounds for objection that the testimony will be inadmissible at the trial if the testimony sought is relevant to the subject matter involved in the pending action and appears reasonably calculated, and intended in good faith, to lead to the discovery of evidence which will be admissible at the trial.

I.

DISCOVERY NOT ALLOWED

Since the reasons for not allowing discovery of automobile liability insurance and its limits are somewhat related, they may be considered together. Some of the reasons advanced for refusing to allow discovery are that discovery of such information: (1) is not relevant to the subject matter,[5] (2) is not reasonably calculated to lead to admissible evidence,[6] (3) is irrelevant and immaterial until such time as a judgment is returned unsatisfied,[7] (4) would give the plaintiff a strategic advantage,[8] (5) is likely to lead to discovery of other assets,[9] (6) would constitute an unreasonable search and seizure and invasion of privacy,[10] and (7) is not based upon any public policy justification.[11] Some courts simply say the leading cases allowing such disclosure are distinguishable because of their statutory basis.[12]

A.

State Cases

The concept of relevancy to the subject matter of the litigation is a thread which binds most of the cases in this area together. For example, in *Sanders v. Ayrhart*[13] the Idaho court held that under its rules of civil procedure relevancy to the subject matter is the basic test as to discoverability and the information concerning the defendant's liability insurance was not relevant to the subject matter of the action. In reaching this decision the court recognized

[5] *E.g.*, Jeppeson v. Swanson, 242 Minn. 547, 68 N.W.2d 649 (1955).

[6] *E.g.*, Roemke v. Wisdom, 22 F.R.D., 197 (S.D. Ill. 1918; McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952).

[7] *E.g.*, Burkes v. Owens, 97 So.2d 693 (Fla. 1957).

[8] *Id.*

[9] *E.g.*, Gallimore v. Dye, 21 F.R.D. 283 (S.D. Ill. 1958).

[10] *E.g.*, Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964). *But see*, People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

[11] *E.g.*, State *ex rel.* Bush v. Elliott, 363 S.W.2d 631 (Mo. 1963).

[12] *E.g.*, Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964). This court observed that the legislatures in such states (those allowing discovery) had given an interest in such policies to every member of society who is negligently injured. In State ex rel. Allen v. District Ct., 69 Nev. 196, 245 P.2d 999 (1952) the court took the view that in the absence of such a statute there is no contractual relationship between the plaintiff and the insurer so therefore the policy is not discoverable. *But see* Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1962) which casts significant doubt upon this distinction by pointing out that the provisions of the standard automobile liability insurance policy contained similar language.

[13] 89 Idaho 302, 404 P.2d 589 (1965).

that (1) discovery is not limited to facts which may be admissible as evidence, (2) the ultimate goal of discovery is acquisition of information which may be used in the proof or defense of an action, and (3) the discovery rules are not intended to supply facts to the litigant for purposes unconnected with the determination of the issues on their merits. The court then reasoned that neither expediency nor the desirability of disposing of lawsuits without trial could justify a court in defeating the limitations of the discovery rules.

Related to the relevancy objection is the view that discovery of an insurance policy and its limits would not lead to admissible evidence at the trial. This view is taken by *Brooks v. Owens*[14] in which the court sustained defendant's contention that his liability insurance was not a proper subject matter of discovery. The Florida court observed that since such insurance was not relevant to prove either liability for an injury or damages resulting therefrom, it would not lead to discovery of admissible evidence. Also, a Missouri court[15] has held that because certain information sought was inadmissible in evidence and was not likely to lead to admissible evidence, discovery of it was not permissible, even though the information sought might aid the inquiring party in preparing for trial.

The case of *Jeppesen v. Swanson*[16] represents a bold, but unsuccessful, attempt by a plaintiff to discover the existence and limits of defendant's liability insurance. The plaintiff did not attempt to couch his request in terms of relevancy, but rather frankly admitted that the information was being sought solely for purposes of evaluating the case and determining whether an out-of-court settlement would be possible. The court however, found that the requested information had nothing to do with the merits of the action—being only for the purpose of placing one party in a more strategic position than he would otherwise occupy. The court then held that there must be some connection between the information sought and the action itself before it becomes discoverable.

[14] 97 So.2d 693 (Fla. 1957).

[15] State *ex rel.* Bush v. Elliott, 363 S.W.2d 631 (Mo. 1963). In Mecke v. Bahr, 177 Neb. 584, 129 N.W.2d 573 (1964), the court was of the opinion that since the subject matter of the litigation was the alleged negligence of the defendant, and inasmuch as the answer to the propounded interrogatory would not show negligence, nor was it reasonably calculated to lead to the discovery of admissible evidence, it therefore was not relevant.

[16] 243 Minn. 547, 68 N.W.2d 649 (1955).

Taking a somewhat different approach, a Pennsylvania court[17] emphasized that to allow such disclosure to enable the plaintiff to decide upon a settlement figure would require a judicial construction abridging the substantive rights of the defendant to be secure in his papers from unreasonable searches. The court added that until the legislature impressed automobile liability insurance policies with a public interest, the content of such policies is not the lawful matter of discovery or inspection.

Some state courts have combined the objections of relevancy and public policy in denying discovery of defendant's insurance policy. In *Di Pietruntonio v. Superior Ct.*,[18] for example, the petitioner was requested to answer interrogatories seeking information as to the extent and nature of his insurance coverage. The court sustained petitioner's objections that the information requested was not relevant to the subject matter in issue and that the request was contrary to the public policy of the state of not compelling revelation of insurance coverage. Finally, a recent Montana decision[19] emphasized the public policy of protecting one against invasion of privacy and an inquisition into one's confidential affairs as to matters which were neither relevant nor necessary in determining any issue in litigation.

B.

Federal Cases

There is a substantial line of federal cases which holds that an insurance policy and its limits are not discoverable in an action for personal injuries, wrongful death, or in any other action in tort. These courts give basically the same reasons as the state courts, but federal courts appear more concerned in their analysis with the scope of examination permissible under Rule 26 (b).

In *Hillman v. Penny*[20] a federal district court denied plaintiff's motion to require the defendant to disclose any automobile liability insurance which he held. This court took the view that although a conflict exists in the various interpretations of Rule 26 (b) of the Federal Rules of Civil Procedure, the weight of reason is

[17] Howell v. Spatz, 14 Pa. D. & C. 2d 295 (1958).
[18] 84 Ariz. 291, 327 P.2d 746 (1958).
[19] State *ex rel.* Hersman v. District Ct., 142 Mont. 139, 381 P.2d 799 (1963).
[20] 29 F.R.D. 159 (E.D. Tenn. 1962).

in favor of interpreting the rules as not contemplating disclosure of insurance matters through discovery. The court held that such information was not admissible at trial nor was it reasonably calculated to lead to admissible evidence. A similar situation arose in Illinois[21] and the federal district court there held that the issues to be resolved were (1) the liability of the defendant and (2) the injuries suffered by the plaintiff. Whether or not the defendant had insurance at the time of the collision was not a question reasonably calculated to lead to admissible evidence on those issues. The existence or nonexistence of libility insurance is not an evidentiary matter usable at trial as it is not relevant to the subject matter in litigation.[22] Thus, it has been held that where the issue of liability is highly contested, disclosure of insurance coverage before trial cannot be justified.[23]

Another bold but unsuccessful attempt to discover a defendant's insurance policy was made in *Flynn v. Williams*[24] on the ground that it would aid him in evaluating his claim, thereby furthering a chance of settlement out of court. The court denied plaintiff's motion saying that the information sought was beyond the scope of inquiry permissible under the federal rules because it was not relevant and could not conceivably lead to discovery of admissible evidence in the present litigation. Similarly a federal district court in Pennsylvania[25] held that whatever advantage the plaintiff might gain would have no relationship to the presentation of his case at trial, and therefore would not lead to disclosure of the kind of information contemplated by the discovery procedure. Even though relief of court calendar congestion is an important factor favoring disclosure, there is also a possibility that disclosure of substantial insurance coverage may lead to delay in settlement.[26]

[21] Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958).

[22] A federal district court in Langlois v. Allen, 30 F.R.D. 67 (D. Conn. 1962) stated that the financial status of the defendant was not relevant in determining the issues in an ordinary negligence action. Whether or not the defendant is able to satisfy a judgment rendered against him has no relevance to whether any judgment should be rendered against him. Likewise, a federal district court in Tennessee held that the sole issue was whether the defendant was guilty of negligence which proximately caused the accident and the insurance policy had no bearing on this issue. Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962).

[23] Rosenberger v. Vallejo, 30 F.R.D. 352 (W.D. Pa. 1962).

[24] 30 F.R.D. 66 (D. Conn. 1958).

[25] McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952).

[26] Bisserier v. Manning, 207 F. Supp. 476 (D. N.J. 1962).

Thus, the federal cases denying discovery have taken a rather strict and narrow view of the scope of examination permissible under rule 26 (b). These courts apparently will not permit inquiry into any area which is not relevant to the subject matter in litigation. To be sure, this is in keeping with the spirit of the scope of examination permissible under the discovery rules, but too often it seems courts equate relevancy with admissibility in evidence.[27] This is true even though the Federal Rules of Civil Procedure do not require that the scope of inquiry be limited to only those matters admissible in evidence.[28]

II.

Discovery Allowed

Those courts, both state and federal, holding that pretrial discovery of insurance is permissible give somewhat unrelated rules and reasons. In the following pages an analysis of each reason will be given through a combined discussion of both state and federal cases.

(1) *Through enactment of state financial responsibility laws, other state legislation, and provisions of the insurance policy itself, the benefit of the policy inures to the injured party, thus making it relevant to the subject matter and therefore discoverable.* As the result of the public policy of providing compulsory sources of compensation for the injured party, a discoverable interest in the policy is created.[29] One district court held that provisions in a policy which allows a plaintiff to proceed against the insurer after obtaining a judgment against the defendant are sufficient to allow discovery of the policy as relevant to the subject matter of the litigation.[30] In *Ash v. Farwell*[31], the court pointed out that an automobile liability insurance policy is written under compulsive provisions of the financial responsibility law, that such policy inures to the benefit of every person negligently injured by the insured, that the

[27] Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955).

[28] Fed. R. Civ. P. 26(b).

[29] *See e.g.* Superior Ins. Co. v. Superior Ct., 37 Cal. 2d 749, 235 P.2d 833 (1951); Lucas v. District Ct., 140 Colo. 510, 345 P.2d 1064 (1959); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); Ash v. Farwell, 37 F.R.D. 553 (D. Kan. 1965); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961). *But see* Brooks v. Owens, 97 So.2d 693 (Fla. 1957).

[30] Schwentner v. White, 199 F. Supp. 710 (D. Mont. 1961).

[31] 37 F.R.D. 553 (D. Kan. 1965).

liability policy constitutes a contract which becomes available for the benefit of such injured person, and that if the insurance policy is relevant after the plaintiff prevails, it is also relevant while the action pends. In *Brackett v. Woodall Food Products, Inc.*[32] the court noted that the trend of legislation, both state and federal, is to require owners and operators of motor vehicles to obtain not only liability insurance, but also to establish minimum requirements for limits of liability. From the tenor and purpose of such legislation the court concluded that such insurance policies were definitely relevant to the subject matter of actions resulting from accidents covered by such policies. Some state courts have reasoned that since the policy is taken out pursuant to compulsory features of the financial responsibility laws, the policy inures to the benefit of every person negligently injured by the insured just as if the injured person were named in the policy.[33]

(2) *The real defendant is the insurance carrier; it conducts the defense of the action, furnishes counsel for the named defendant, and conducts such investigation and settlement negotiations as it deems necessary.* In the same vein it is asserted that the defendant himself should not object since he purchased the policy for self-protection, and discovery would increase the possibility of settlement within the policy limits.[34] A case often cited for this proposition is *Lucas v. District Ct.*[35] in which the court held the existence of liability insurance and the extent of coverage are relevant to the subject matter in view of the fact that the insurance carrier actually defends the action and must respond in damages to the extent of its coverage after a judgement is obtained. This court further observed that disclosure of insurance coverage is important because if the defendant fails to notify his insurance carrier of the pendency of the action, he may lose any claim he has against his insurance company.[36]

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[32] 12 F.R.D. 4 (E.D. Tenn. 1951).

[33] *See* Pettie v. Superior Ct., 178 Cal. App. 2d 680, 3 Cal Rptr. 267 (1960); Superior Ins. Co. v. Superior Ct., 37 Cal 2d 749, 235 P.2d 833 (1951); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

[34] *See* Slomberg v. Pennabaker, 42 F.R.D. 8 (M.D. Pa. 1967); Ellis v. Gilbert, 19 Utah 2d 189, 429 P.2d 39 (1967).

[35] 140 Colo. 510, 345 P.2d 1064 (1959).

[36] *See also* Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961).

(3) *The existence, terms, and limits of automobile liability insurance are relevant to the subject matter of the litigation.*[37] An example of the rationale of the case holding that insurance is relevant to the subject matter is found in *Ellis v. Gilbert*[38] as follows:

> In considering what is the "subject matter" of a lawsuit we keep in mind that the ultimate objective of any lawsuit is a determination of the dispute between the parties; and that the earlier and easier this can be accomplished, with justice to both sides, the better for all concerned. Whatever helps to attain that objective is "relevant" to the lawsuit.

An Oregon federal district court[39] has specifically held that questions concerning the existence and limits of liability insurance are relevant to the subject matter and that they are within the spirit and meaning of Rule 26 (b) of the Federal Rules of Civil Procedure. Furthermore, it has been recognized that because one of the purposes of discovery is to encourage settlements this goal is furthered by allowing discovery of liability insurance and its limits.[40]

(4) *If an insurance policy is relevant after a judgment is rendered, it is relevant while the action is pending.* This view was followed in *Maddox v. Grauman*[41] in which the Kentucky court stated:

> If the insurance question is relevant to the subject matter after the plaintiff prevails, why is it not relevant while the action pends? We believe it is. An insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but it is an agreement that embraces those whose person or property may be injured by the negligent act of the insured. We conclude the answers to the propounded questions are relevant to the subject matter of the litigation. . . .[42]

(5) *Disclosure of insurance will facilitate the amicable settlement of claims without the necessity of a trial.*[43] A California Ap-

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[37] *See generally* Annot., 13 A.L.R.3d 822 (1967).
[38] 19 Utah 2d 189, 429 P.2d 39, 40 (1967).
[39] Hurley v. Schmid, 37 F.R.D. 1 (D Ore. 1965).
[40] Hill v. Greer, 30 F.R.D. 64 D. N.J. 1961).
[41] 265 S.W.2d 939 (Ky. 1954).
[42] *Id.* at 942. This same view was followed in Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959).
[43] *See, e.g.,* People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

pellate Court[44] has adopted the view that disclosure of liability insurance is relevant to the subject matter of the action because it tends to promote the efficacious disposition of negligence litigation by settlement. In *Cook v. Welty*[45] the court noted that it is in the interest of the administration of justice, as well as beneficial to the litigants, that as many actions as possible be amicably adjusted without trial. This court further observed that it can no longer be doubted that information concerning liability insurance and its extent is conducive to fair negotiations and just settlements.

The objection to this argument is that such information will place the plaintiff in a better strategic position during the negotiation process. The Alaska[46] court has answered this contention by admitting, on the one hand, that such disclosure would be of assistance to a plaintiff in determining whether to settle or prosecute the action, but pointing out that no advantage is conferred insofar as the actual trial of the issues is concerned. Especially in cases where injuries are extensive but coverage is low, the plaintiff may settle for a smaller sum. In such cases the interest of the administration of justice and the interests of individual litigant are served by settlements.[47]

III.

CONCLUSION

From an analysis of the cases no discernable trend appears to offer a viable solution to the irreconcilable conflict existing in both state and federal cases in this area. In practice it would seem that a citation of cases is useless since it is just a matter of which side of the argument a particular court follows. In describing this hopelessly conflicting situation one writer concludes:

> This is not a healthy situation.
>
> We pride ourselves on our system of stare decisis and the symmetry it gives to the law with its built-in sensitivity to changes inherent in a dynamic society. Yet the courts cannot even start to approach uniformity on a relatively simply legal concept involving a liability insurance contract which affects every man, woman, and child in the United States.[48]

[44] Pettie v. Superior Ct., 178 Cal. App. 2d 680, 3 Cal. Rptr. 267 (1960).
[45] 253 F. Supp. 875 (D.D.C. 1966).
[46] Miller v. Harpster, 392 P.2d 21 (Alas. 1964).
[47] *See* People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 588 (1957).
[48] Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 U. KAN. L. REV. 59, 84 (1965).

Most courts agree that the Federal Rules of Civil Procedure or similar state provisions should be liberally construed. Advocates of full disclosure argue that such discovery would promote the expressed function of these rules—"to secure the just, speedy, and inexpensive determination of every action."[49] Since such discovery would eliminate secrets, mysteries, and surprise it would appear to be more in harmony with the object and purpose of the rules of civil procedure. It might even promote the disposition of claims without trial and aid in obtaining just results in cases which are tried.[50]

Some hope for resolving this conflict in the near future may exist. At least the results of the Columbia conference on the Federal Rules of Civil Procedure suggest that a unifying change in the rules should be forthcoming which will provide that "liability insurance coverage is to be discoverable as a matter of course."[51]

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[49] FED. R. CIV. P. 1. Barron and Holtzoff state:
Knowledge as to the defendant's insurance permits a more realistic appraisal of a case and undoubtedly leads to settlement of cases which otherwise would go to trial. Since Rule 26(b) is not in itself decisive one way or the other on the point, these courts (those allowing discovery of insurance) believe that the mandate of Rule 1 requires that construction of Rule 26(b) which mill lead to the speedy determination of actions by settlement. 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 82 (C. Wright ed. 1961).

[50] Lucas v. District Ct., 140 Colo. 510, 345 P.2d 1064 (1959).
It is a strange situation indeed, when under our established rules of civil procedure we emphasize that their avowed purpose is to establish the 'truth' and require 'full disclosure,' while at the same time we treat a policy of liability insurance as though it is so sacrosanct that not even a court of justice may glance at it. Confidence in the courts and in court procedure is not enhanced by this judicial attitude. ASH *v.* FARWELL, 37 F.R.D. 553, 555 (D. Kan. 1965).

[51] *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 491 (1969).